

**IN THE UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF PENNSYLVANIA**

CHRISTOPHER TEMPLIN, VIOLA HENDRICKS,
FELDMAN'S MEDICAL CENTER PHARMACY,
INC., and FCS PHARMACY LLC,

Plaintiffs,

-against-

Civil Action No. 09-4092 (JHS)

INDEPENDENCE BLUE CROSS, QCC
INSURANCE COMPANY, and CAREFIRST, INC.,

Defendants.

**DEFENDANTS' JOINT MOTION TO DISMISS
PLAINTIFFS' THIRD AMENDED COMPLAINT**

For the reasons set forth in the accompanying memorandum of law, defendants Independence Blue Cross, QCC Insurance Company and CareFirst, Inc. hereby jointly move pursuant to Federal Rules of Civil Procedure 12(b)(1) and 12(b)(6) to dismiss plaintiffs' Third Amended Complaint (D.E. 129) with prejudice.

Respectfully submitted,

/s/ Katherine M. Katchen

David L. Comerford

Katherine M. Katchen

Matthew R. Varzally

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Counsel for the IBC Defendants

&

/s/ Mark J. Oberstaedt (w/p)

Mark J. Oberstaedt
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One Centennial Square
33 E. Euclid Ave.
Haddonfield, N.J. 08033
Phone: (856) 354-3072

Counsel for CareFirst

Dated: April 1, 2013

CERTIFICATE OF SERVICE

I, Matthew R. Varzally, hereby certify that on April 1, 2013, I caused a true and correct copy of the **Defendants' Joint Motion to Dismiss Plaintiffs' Third Amended Complaint** to be filed and made available for viewing and downloading by all counsel of record for the parties through the Court's ECF system.

/s/ Matthew R. Varzally

Matthew R. Varzally

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-against-

INDEPENDENCE BLUE CROSS, QCC
INSURANCE COMPANY, and CAREFIRST, INC.,

Defendants.

ORDER

AND NOW, this ____ day of _____, 2013, upon consideration of the Defendants' Joint Motion to Dismiss Plaintiffs' Third Amended Complaint and memorandum of law in support thereof, and any response by plaintiffs in opposition thereto, it is hereby ORDERED that said motion is GRANTED. Plaintiffs' remaining claims are DISMISSED WITH PREJUDICE.

BY THE COURT:

Joel H. Slomsky, U.S.D.J.

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Plaintiffs,

-against-

Civil Action No. 09-4092 (JHS)

INDEPENDENCE BLUE CROSS, QCC
INSURANCE COMPANY, and CAREFIRST, INC.,

Defendants.

**BRIEF IN SUPPORT OF THE DEFENDANTS' JOINT MOTION TO
DISMISS PLAINTIFFS' THIRD AMENDED COMPLAINT**

I. INTRODUCTION

On June 27, 2012, the Third Circuit Court of Appeals affirmed this Court's February 14, May 13 and August 19, 2011 opinions, respectively, in all respects save one. The Third Circuit remanded this case to this Court for the sole purpose of addressing plaintiffs' remaining demand for interest under ERISA. Plaintiffs filed a Third Amended Complaint ("TAC") (D.E. 129) seeking such interest from the IBC Defendants and CareFirst, in addition to attorney's fees and costs. On March 27, 2013, the parties fully and finally resolved the remaining claims in this case, entering into a "Covenant Not to Sue" which states, *inter alia*, that plaintiffs "promise not to sue or proceed in any manner against the Defendants . . . on the claims in the Third Amended Complaint." Exhibit A attached hereto (the "Covenant") at p. 1. The Covenant renders plaintiffs' remaining claims against the IBC Defendants and CareFirst moot. For this reason, this Court should dismiss plaintiffs' TAC with prejudice.

II. ARGUMENT

Plaintiffs' TAC is moot and therefore this Court lacks subject matter jurisdiction over this case. "A case becomes moot – and therefore no longer a 'Case' or 'Controversy' for purposes of Article III – 'when the issues presented are no longer 'live' or the parties lack a legally cognizable interest in the outcome.'" *Already, LLC v. Nike, Inc.*, 133 S. Ct. 721, 726-27 (2013) (citations omitted). In its *Already* decision, the United States Supreme Court affirmed the dismissal of a counterclaim rendered moot by the execution of a covenant not to sue. *See generally id.* The Court held that "Already's only legally cognizable injury . . . is now gone and, given the breadth of the covenant [not to sue], cannot reasonably be expected to recur. There being no other basis on which to find a live controversy, the case is clearly moot." *Id.* at 732.

The same holding is required in this case. Plaintiffs seek interest from the IBC Defendants and CareFirst in the TAC. The parties' Covenant renders plaintiffs' demand moot. The fact that plaintiffs' counsel has stated their intention to file a separate motion for attorney's fees and/or costs is irrelevant. In granting the IBC Defendants' motion to dismiss plaintiffs' Second Amended Complaint, this Court correctly held that "a request for [attorney's] fees does not preserve a claim that otherwise has become moot." May 13, 2011 Opinion (D.E. 74) at 11 (citation omitted);¹ *see also Budinich v. Becton Dickinson and Co.*, 486 U.S. 196, 200 (1988) ("we think it indisputable that a claim for attorney's fees is not part of the merits of the action to which the fees pertain"); *District of Columbia v. Jeppsen*, 514 F.3d 1287, 1289 (D.C. Cir. 2008) (recognizing that "when intervening events have mooted the plaintiff's underlying claim, the plaintiff's continuing interest in attorney's fees does not support her continued standing to pursue the underlying claim"); *Pakovich v. Verizon LTD Plan*, 653 F.3d 488, 492 (7th Cir. 2011) (claim

¹ *Rev'd in part on other grounds*, 487 Fed. Appx. 6 (3d Cir. 2012).

for ERISA benefits was moot despite plaintiff's request for fees); Fed. R. Civ. P. 54(d)(2)(B)(i) (requiring that motions for attorney's fees "be filed no later than 14 days *after the entry of judgment*") (emphasis added).

III. CONCLUSION

For the foregoing reasons, the IBC Defendants and CareFirst respectfully request that this Court grant their joint motion and dismiss plaintiffs' Third Amended Complaint with prejudice.

Respectfully submitted,

/s/ Katherine M. Katchen
David L. Comerford
Katherine M. Katchen
Matthew R. Varzally
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Phone: (856) 354-3072

Counsel for CareFirst

Dated: April 1, 2013

EXHIBIT A

COVENANT NOT TO SUE

This Covenant Not to Sue is hereby made and entered into as of this 27th day of March, 2013 by and between Christopher Templin ("Templin"), Viola Hendrick ("Hendrick"), Feldman's Medical Center Pharmacy, Inc. ("Feldman's"), and FCS Pharmacy, LLC ("FCS") (collectively, "Plaintiffs") on the one hand, and Independence Blue Cross ("Independence"), QCC Insurance Company ("QCC") and CareFirst, Inc. ("CareFirst") (collectively "Defendants"), on the other hand.

Plaintiffs seek interest on the claims identified in Plaintiffs' Third Amended Complaint filed February 15, 2013 in the case captioned Templin, et al. v. Independence Blue Cross, et al. Civil Action No. 09-4092-JHS.

In exchange for payment in the amount of Sixty-Eight Thousand Dollars (\$68,000.00), Plaintiffs, each on behalf of themselves, and on behalf of their heirs, legal representatives, trustees, shareholders, principals, attorneys, creditors, insurers, affiliates, parent corporations, subsidiaries, officers, directors, employees, independent contractors, predecessors and successors promise not to sue or proceed in any manner against the Defendants, their trustees, shareholders, principals, attorneys, insurers, affiliates, parent corporations, subsidiaries, officers, directors, employees, independent contractors, predecessors and successors, on the claims in the Third Amended Complaint.

Plaintiffs hereby warrant and represent that they are the sole and lawful owners of all rights, title, and interest in and to all matters released herein, and that they have not heretofore assigned or transferred, or purported to assign or transfer, any of such released matters, in whole or in part, to any other person or entity.

The aforementioned payment will be made no later than April 22, 2013 and sent via wire to the following account:

Bank: JPMorgan Chase Bank
1 Chase Manhattan Plaza
New York, New York 10005

For the benefit of:
Account name: IOLA-Paduano & Weintraub LLP
Account No.: 217502250265
As attorneys for Christopher Templin, Viola Hendrick, Feldman's Medical Center
Pharmacy, Inc., and FCS Pharmacy, LLC

Undersigned counsel for the parties represent and warrant that they have full and complete authority to enter into and sign this agreement on behalf of their respective clients.

/s/ Anthony Paduano

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Counsel for Plaintiffs

March 27, 2013

/s/ KATHERINE M. KATCHEN

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Counsel for Defendants IBC and QCC

March 27, 2013

/s/ MARK OBERSTAEDT

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Counsel for Defendant CareFirst, Inc.

March 27, 2013